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International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2934/2017*, **

Communication submitted by:	M.B. (represented by counsel, Ian Bassett and David Hoskin)
Alleged victim:	The author
State party:	New Zealand
Date of communication:	19 December 2016 (initial submission)
Date of adoption of decision:	28 March 2017
Subject matter:	Fairness of criminal proceedings
Procedural issues:	Exhaustion of domestic remedies; substantiation of claims
Substantive issues:	Right to a fair trial; presumption of innocence; right to defence; right to appeal a conviction; right to privacy
Articles of the Covenant:	14 (1), (2), (3) and (5) and 17
Articles of the Optional Protocol:	2 and 5 (2) (b)

1. The author of the communication is M.B., a national of New Zealand. He claims that the State party has violated his rights under articles 14 (1), (2), (3) and (5) and 17 of the Covenant. The Optional Protocol entered into force for New Zealand on 26 August 1989. The author is represented by counsel.

The facts as submitted by the author

2.1 The author was employed by a company called Kerry NZ Limited (hereinafter, "the company") as Chief Financial Officer from 9 January to 11 August 2006. He claims that in April or May 2006, he discovered financial misconduct by the Managing Director at the company. This led to them having a disagreement and it was therefore agreed between the Managing Director and the author that the latter would leave the company in August 2006. In June or July 2006, the author discovered further significant financial irregularities in the

* Adopted by the Committee at its 119th session (6 March-29 March 2017).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Anja Seibert-Fohr, Yuval Shany and Margo Waterval.

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company accounts and he informed the majority shareholder of these irregularities. After the author left the company he was accused of having, during his employment, wrongfully accessed a computer payroll program and increased his annual salary by 6 per cent from $NZ 165,000 (US$ 116,000) to $NZ 175,000 (US$ 123,000) and of having increased his holiday pay. He was further accused of having subsequently amended the computer records in July 2006, just before leaving the company, in order to conceal this increase.

2.2 In October 2006, the company sought to recover what it claimed were overpayments to the author. When the author declined to pay, a formal complaint against him was made to the police in May 2007. The author was interviewed by the police on 28 July 2008 and subsequently charged, on 6 August 2008, with having accessed a computer system without claim of right and for dishonest purpose in order to obtain a pecuniary advantage contrary to article 249 (1) (a) of the Crimes Act 1961. The author argues that he had a good defence against these charges as the salary increase had been orally authorized by the Managing Director of the company. The Managing Director later denied this fact. The author claims that the Managing Director denied that the salary increase had been authorized because he had not sought the approval of the company's majority shareholder before increasing the author's salary. The author further claims that the Managing Director denied having approved the salary increase "as revenge" against him for having disclosed the financial irregularities at the company to the majority shareholder. The author also claims that he did not amend the computer records to conceal his conduct, and that the amendment was carried out by the Managing Director's son. He further claims that the company's payroll program was inherently unreliable and that its records could be altered without trace and that consequently the suspicious amendment of the author's salary in July 2006 could not be reliably attributed to him.

2.3 The author notes that he gave explicit written instructions to his trial counsel to advance the defence grounds noted above, including the motive of the Managing Director to lie about the salary increase, the unreliability of the company's payroll program, where to locate relevant witnesses and the available supporting evidence. However, at trial before the Auckland District Court, the author's counsel did not follow his instructions and did not prepare the available evidence to support his defence. The trial judge concluded therefore that the computer records were reliable and the author was found guilty on 24 November 2010. He was sentenced to 200 hours of community work and ordered to pay reparation of $NZ 18,681 (US$ 13,130).

2.4 The author appealed the verdict of the Auckland District Court to the Court of Appeal on the grounds that his trial counsel had failed to follow his instructions and to advance his defence, to adduce the evidence available and to properly cross-examine witnesses. On appeal, the author's trial counsel did not dispute the fact that they had received clear instructions to advance the author's "revenge defence" and to challenge the reliability of the company's payroll program, but asserted that they did not do so as they were entitled to exercise independent judgment as to which aspects of the defence to advance, and because the defence arguments advanced by the author lacked a paper trail and evidential basis. The author also adduced new expert evidence on the unreliability of the company's payroll program before the Court of Appeal, which was uncontested.[1] The Court dismissed the author's appeal and noted that it was "difficult to escape the conclusion that [the author was] trying to re-litigate under the guise of counsel error". The Court further found that, to the extent it could rely on the new evidence that the author sought to adduce, this would not have altered the outcome of the case. The author argues that the Court did not permit the author's appellate counsel sufficient time to cross-examine the author's trial counsel and other witnesses in order to establish the extent and effect of their refusal to follow the author's instructions during the trial.

2.5 The author sought leave to appeal the verdict of the Court of Appeal to the Supreme Court. On 23 May 2012, the Supreme Court denied the author's request for leave to appeal,

[1] Under cross-examination the author stated that he had not specifically instructed his first-instance trial counsel to call the two experts in question. Given the author's qualifications and experience, the Court of Appeal found that he was responsible for the decision not to call the experts in question and that this did not constitute an error on the part of his trial counsel.

finding that it had not been shown that the "Court of Appeal's detailed analysis of the new evidence [was] wrong or incomplete". As for the author's claim that sufficient time had not been allocated to the author's appellate counsel for the cross-examination of witnesses, the Supreme Court noted: that the appellate counsel had not indicated to the Court of Appeal that a fair appeal would not be possible if the time allocated by the presiding judge was followed; that in the appeal to the Supreme Court the appellate counsel had not pointed to any specific topics he had wanted to cover in cross-examination that the time constraints had prevented; and that in order to accommodate the appellate counsel's cross-examination, the Court of Appeal had ended up giving him more time than initially indicated. The Supreme Court thus found that no miscarriage of justice had arisen from the procedure adopted.

2.6 The author brought a civil claim of negligence against his first-instance trial counsel, which was settled on 11 April 2014 under terms covered by a confidentiality agreement.

The complaint

3.1 The author claims that his rights under article 14 (1) and (3) of the Covenant were violated as his trial counsel was permitted to disregard his defence instructions. The author claims that he gave clear instructions to his trial counsel on the challenges to be made to the prosecution evidence, but that they did not explore these key factual elements of his defence, having failed or refused to follow or implement his instructions at trial. The Court of Appeal did not find this problematic and accepted that the trial counsel was permitted to refuse to follow instructions and to advance the author's version of events, in violation of his rights under article 14 of the Covenant.

3.2 The author also claims that his rights under article 14 (3) of the Covenant were violated as there was an undue delay in the proceedings against him. The author notes that the complaint against him to the police was made in May 2007, but that the guilty verdict was not rendered until 24 November 2010, a period of three years and six months, in a simple case involving oral evidence from four prosecution witnesses and five days of evidence at trial. The author further notes that from being charged in August 2008, the process took over two years and two months. The author also notes that no delay was due to him and argues that no remedy against such a delay is available in the legal system of New Zealand, as such a delay is considered to be acceptable.

3.3 The author further claims that his rights under article 14 (2) were violated as the appellate courts did not adequately review the safety of the conviction. He claims that the uncontested evidence submitted on appeal showed that the company's payroll program was unreliable and hence the Court of Appeal should not have relied upon the program in relation to the contested July 2006 salary entry. He alleges that in the absence of reliable computer evidence in that regard, the case was a mere allegation and counter allegation between him and the Managing Director of the company.

3.4 The author also claims that his rights under article 14 (5) were violated because of a systemic defect in the laws of New Zealand regarding the right to appeal in criminal cases, as the appellate courts attach inadequate importance as to whether the instructions of the defendant have been followed by trial counsel. He argues that the appellate courts' focus on whether there had been a miscarriage of justice, rather than an unfair trial process, breached his right to appeal.

3.5 The author further claims that his rights under article 17 were violated as the failure by the trial counsel to follow his instructions breached his right of autonomy.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Committee must determine whether it is admissible under the Optional Protocol.

4.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of *international investigation or settlement.*

4.3 The Committee notes that the author's claim under article 14 (3) of the Covenant concerning the alleged delay in the proceedings against him was not raised by the author before the national courts. The Committee takes note of the author's argument that no effective remedy against such a delay is available in New Zealand. The Committee recalls its jurisprudence that, although there is no obligation to exhaust domestic remedies if they have no chance of being successful, authors of communications must exercise due diligence in the pursuit of available remedies and that mere doubts or assumptions about their effectiveness do not absolve the authors from exhausting them.[2] The Committee observes that, in the present case, the author has not provided any arguments to justify why he considers that no effective remedies are available in New Zealand in that regard. In these circumstances, and in the absence of any further information on file, the Committee declares this part of the communication inadmissible pursuant to article 5 (2) (b) of the Optional Protocol.

4.4 The Committee notes the author's arguments that the State party violated his rights under articles 14 (1), (2), (3) and (5) and 17 of the Covenant, because: (a) his counsel did not follow his instructions during the trial; (b) the appellate courts refused to provide him with a remedy for his counsel's misconduct; (c) the appellate courts did not adequately review the evidence used to convict him; (d) there is a systemic defect in the laws of New Zealand regarding the right to appeal in criminal cases as the appellate courts attach inadequate importance as to whether the instructions of the defendant have been followed by trial counsel; and (e) the appellate courts' focus on whether there had been a miscarriage of justice, rather than an unfair trial process, breached his right to appeal. The Committee takes the view that these allegations relate essentially to the evaluation of facts and evidence carried out by the New Zealand courts, and to their application of national legislation. The Committee recalls its constant jurisprudence that it is not a final instance competent to re-evaluate findings of fact or the application of national legislation, unless it can be ascertained that the proceedings before the national courts were clearly arbitrary or amounted to a denial of justice.[3] In the present case, the Committee considers that the author has failed to substantiate, for purposes of admissibility, that the conduct of the national courts amounted to arbitrariness or a denial of justice. Accordingly, these claims are inadmissible under article 2 of the Optional Protocol.

5. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 5 (2) (b) of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the author of the communication.

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[2] See, inter alia, communications No. 1511/2006, *García Perea v. Spain*, decision of inadmissibility adopted on 27 March 2009, para. 6.2, and No. 1639/2007, *Zsolt Varga v. Canada*, decision of inadmissibility adopted on 28 July 2009, para. 7.3.

[3] See communications No. 541/1993, *Simms v. Jamaica*, decision of inadmissibility adopted on 3 April 1995, para. 6.2; No. 1138/2002, *Arenz, Röder and Röder v. Germany*, decision of inadmissibility adopted on 24 March 2004, para. 8.6; No. 917/2000, *Arutyunyan v. Uzbekistan*, Views adopted on 29 March 2004, para. 5.7; and No. 1528/2006, *Fernández Murcia v. Spain*, decision of inadmissibility adopted on 1 April 2008, para. 4.3.